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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1945.

MARY LOIS McINTOSH,
Petitioner,

vs.

CHARLES WIGGINS and MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, as Executors u/w of Ella L. Wiggins, Deceased, and

CHARLES WIGGINS and MISSISSIPPI VALLEY TRUST COMPANY, a Corporation, as Trustees Under Certain Trusts Established by Ella L. Wiggins During Her Lifetime,
Respondents.

No. 1047.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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ADDITIONAL STATEMENT OF THE CASE.

Petitioner's statement of the case is quite incomplete, and we submit, in some respects, quite inaccurate. In order to apprise the Court of what really is involved in this case, it is necessary for the respondents to state the case as briefly as possible, or so much of it as is not

stated in Petitioner's brief. The statement follows (Petitioner will be referred to hereafter in this statement of the case as the plaintiff):

Statement of the Facts.

This suit was instituted on January 15, 1943, for a declaratory judgment and other relief and asked the Court in substance to construe the will of the late John E. Liggett; to declare the effect of the recent case of Kennard v. Wiggins (160 S. W. [2d] 706) upon two prior judgments in favor of Mrs. Wiggins and against Mrs. McIntosh (Perry v. Wiggins, 67 F. [2d] 622) and (McIntosh v. Wiggins, 123 F. [2d] 316) seeking thereby to avoid the effect thereof and asking for a recovery of the income from the disputed share of the Liggett property from 1928, the date of the death of Mrs. Kilpatrick, the mother of Mrs. McIntosh, until October 17, 1942, the date of the death of Mrs. Wiggins. In addition, the suit sought from the Executors an accounting for this income and the securities into which it had been invested and asked for an injunction to prevent the defendants from claiming the income; charged in substance that the transfers to the trust by Mrs. Wiggins were in fraud of creditors and asked that the assets of the trust be subjected to the claim of the plaintiff (Tr. 1-26).

The trial court on September 12, 1944, rendered a decree in favor of the plaintiff holding that she was entitled to the disputed income and rendered a money judgment against the Executors for $386,274.94 representing the disputed income over the whole 14-year period, plus 6% interest with annual rests for the 14 years (Tr. 861-898). In addition to the money judgment the Court made a specific decree that certain securities into which the income had been invested, which were held by the St. Louis Union Trust Company should be transferred and delivered by the Executors to the plaintiff (Tr. 899).

A more detailed statement of the case follows:

John E. Liggett, late of the City of St. Louis, died on November 23, 1897, leaving a will probated in the City of St. Louis (Tr. 136). By the terms of this will, Mr. Liggett left his stock in the Liggett & Meyers Tobacco Company and the Liggett Realty Company and his other property to his three sons-in-law in trust under the terms of which the stock of the Liggett Realty Company was to be held for the benefit of his three daughters, Cora B. Fowler, Dolly L. Kilpatrick and Ella D. Scott (later Ella L. Wiggins) "for and during the natural lives of my said daughters in equal portions, share and share alike, with remainder over as to the undivided share aforesaid, of each one, to the heirs of the body of each one of my said daughters as their absolute property, per stirpes and not per capita; but should any of my said daughters die without issue then her portion of the Liggett Realty Company stock for life should go to the survivor and survivors of my said daughters in equal portions for life, with remainder over, as to such portion, to the heirs of the body if such shall die leaving issue of their body absolutely, share and share alike, per stirpes" (Tr. 137-8).

The will further provided that all the rest of his property should be likewise held by the trustees for the benefit of his daughters and of a grandson, John E. Liggett, Jr. (Tr. 139), and the income should be paid over to the same persons as provided and directed in the clause of the will with respect to the stock of the Liggett Realty Company and excepting as to the share of the grandson which should be paid over as elsewhere directed (Tr. 139-40).

Th will further provided that when the grandson should arrive at the age of thirty years the trust shall cease and terminate, and that thereupon the trustees should account for and pay over and deliver all the property then held in the trust to the beneficiaries under the provisions and in accordance with the directions of the will (Tr. 141). It

was also provided that when the grandson reached the age of thirty his share should be paid over to him outright.

In 1916 the grandson attained the age of thirty years and the trust terminated (Tr. 148). Later in the same year the trustees obtained a decree from the Circuit Court in the City of St. Louis approving and confirming their accounts and certain partial distributions and the remaining property, real and personal, constituting the principal, was divided between the grandson and the three daughters and the grandson's share was immediately conveyed to him (Tr. 149). The remaining three-fourths was divided among and allotted to the three daughters, but theirs was not paid over to them because the trustees were in doubt as to the nature of the estate which they took in this property after the termination of the trust, and the accounting decree expressly saved to the daughters the right to bring an action to construe the will to determine the nature of their respective interests (Tr. 151-2). Thereupon in 1920 suit to construe the will was filed by the three daughters in the Circuit Court of the City of St. Louis. This was brought against the descendants of the plaintiffs, which included Mary Lois Perry (now Mary Lois McIntosh), the daughter of Mrs. Kilpatrick, Eugene Perry, a minor son of Mary Lois Perry, Elizabeth Scudder, granddaughter of Mrs. Kilpatrick by a deceased daughter (now Mrs. Kennard), Elinor Scott Van Riper, the only child of Mrs. Wiggins, and her two minor children. The plaintiffs in that suit, the three daughters, claimed that under the will they were the owners of an absolute fee simple estate in the property distributed to them, respectively (Tr. 152). It was further alleged that the trustees were made parties defendant, that they had not yet conveyed the property to the three daughters "because said trustees are in doubt about the nature and extent of the estate vested in and to be conveyed to the daughters of the said testator, but said trustees have been ready and willing to make com-

plete distribution and conveyance upon being advised by the decree of this Court in this cause as to the construction to be put upon the will and the nature of the conveyances to be made by said trustees pursuant thereto" (Tr. 152).

That a large part of the trust was invested in real estate resulting from the conversion of the proceeds of securities (Tr. 153).

The defendants included all the living descendants of each of the three daughters. Mrs. Fowler had none (Tr. 153).

It was further alleged in the petition "that the persons named as parties in this petition, as amended, are joined herein not only in respect of the title and interest, if any, held by each such party in the subject matter hereof, but also in respect of all contingent interests under said will" (Tr. 145). It was further alleged that the plaintiffs and the defendant trustees are in doubt in respect to the construction of the will and need and ask the aid of the Court to construe it upon the following questions, among others:

> "(a) Whether the estate vested by said will and decree in the said three daughters of the testator is an absolute estate in fee simple, or is a life estate with remainder over, and, if it be the latter, then in whom is said remainder vested, and what are the nature, extent, conditions and limitations of the estate vested in said three daughters of the testator, and in the remainder?" (Tr. 154.)

The prayer of the petition was as follows:

> "Wherefore, Plaintiffs pray the judgment and decree of this Court construing said will of John E. Liggett, deceased, upon each of the points hereinabove set out; and for directions to said trustees in respect to the nature of the conveyance that said trustees should execute and deliver pursuant to said will, for the pur-

pose of vesting in the beneficiaries entitled thereto the said estate, three-fourths portion of said trust estate set apart as aforesaid to the said three daughters of the testator; and advising and directing said trustees and the plaintiffs in respect of the further rights of the plaintiffs in and to said trust estate, and the further duties of said trustees in respect thereto, to the end that the intent of said will may be given full effect; and for the authority and instructions and direction of this Court, and a decree, authorizing and directing the sale of said property acquired as aforesaid from said Byr Investment Company for such other and further relief as may be meet in the premises."

Mrs. Perry was personally served with a summons and copy of the petition (Tr. 60).

While she was served with the original petition and the one in evidence is entitled amended petition, the only amendment was the addition of another defendant, a newborn child, born during the pendency of the proceeding, who was added as a party (Tr. 135-148). Mrs. Perry (now Mrs. McIntosh) employed no counsel, filed no answer and took no part in the proceeding, but made default (Tr. 207). The trustees answered admitting that they were in doubt as to whether the will intended the life estates to apply only to the period while the trust should continue, or whether they were intended to apply at all to the distribution to be made on termination of the trust (Tr. 184). They prayed instruction of the Court concerning their powers and duties (Tr. 186). Elizabeth Scudder's father was appointed her guardian ad litem and he filed an answer for her through his attorney, Charles Reber (Tr. 201-203). In that answer the guardian took the position that the plaintiffs, the three daughters, were given life estates only with remainder over in fee upon the death of each daughter to her then surviving issue and in case there be none, with remainder as to her share to the survivor or survivors of the daughters in equal portions for

life with remainder over in fee upon the death of the last survivor of the daughters to the surviving issue of the daughters, share and share alike, per stirpes, and asked the Court by its decree to so adjudge and determine and to so construe the will (Tr. 202).

Mr. Reber represented the other minors as guardian ad litem, including the Van Riper children, Mrs. Wiggins' grandchildren, and Eugene Perry, son of Mrs. McIntosh (Tr. 203-4).

In June, 1923, the Circuit Court rendered a decree in which it held that the three daughters had life estates only in both the real and personal property, constituting their share of the estate (Tr. 65).

The Court in its decree further found that this personalty had not yet been delivered and that the real estate had not yet been conveyed by the trustees as directed by the accounting decree (Tr. 77).

The Court adjudged that the daughters under the will took life estates only with contingent remainders over as specifically set forth in the decree (Tr. 79). The decree contained the following provisions with respect to the devolution of the share of Mrs. Fowler (and similar provisions mutatis mutandis for the shares of her two sisters):

"And it is further adjudged and decreed that upon the death of said Cora B. Fowler said property shall go to and vest absolutely, per stirpes, and not per capita, in her then surviving issue, if any; but in default of such issue, then said property shall go as follows:

(1) If both her sisters, Ella L. Wiggins and Dolly L. Kilpatrick, shall survive her, then an undivided one-half interest in said property shall go to and vest in each of said sisters for her life, and on the death of each of them, the undivided one-half interest therein of the one so dying shall go to and vest in the survivor for her life, and upon

her death the whole of said property shall go to and vest absolutely in the then surviving issue of said Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita.

(2) If only one sister shall survive her, then said property shall go to and vest in such surviving sister for her life, and at her death shall go to and vest absolutely in the then surviving issue of her said sisters, Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita.

(3) If no sister shall survive her, then said property shall go to and vest absolutely in the then surviving issue of said Ella L. Wiggins and Dolly L. Kilpatrick, share and share alike, per stirpes and not per capita" (Tr. 83).

This is the portion of the decree out of which this dispute arose.

The Court further found that the legal title to the real estate in the share of the three daughters was still held by the trustees under the will and it was adjudged "that the legal title be and is by the decree transferred out of the trustees and vested in equal undivided shares of the three daughters as tenants in common for life only with remainders over as hereinabove defined in respect of all the personal property received by said daughters, respectively" (Tr. 87). From this decree, the plaintiffs, the three daughters, appealed to the State Supreme Court where the decree was affirmed. Wiggins v. Perry, 271 S. W. 815 (no official report made).

Mrs. Perry did not appeal and took no part in the proceeding in the State Supreme Court. After the affirmance in 1925, nothing occurred until 1928. In July of that year Mrs. Fowler died without issue, and under the terms of the will and the decree Mrs. Kilpatrick and Mrs. Wiggins each became entitled to one-half of her third for life, but a

month later, in August, 1928, Mrs. Kilpatrick died (Tr. 104), leaving as her heirs her daughter, Mrs. Perry, and a granddaughter, Elizabeth Scudder, who in the meanwhile became of age and subsequently married Kennard. These heirs of Mrs. Kilpatrick received Mrs. Kilpatrick's own third upon her death. However, under the terms of the will as construed by the decree, Mrs. Wiggins became entitled to the Kilpatrick half of the Fowler third for the rest of her life.

However, thereupon Mrs. Kennard and Mrs. McIntosh took the position that the will construction decree was incorrect and that under the will they became immediately entitled to Mrs. Kilpatrick's half of the Fowler third upon Mrs. Kilpatrick's death and that that half did not pass to Mrs. Wiggins for her life as provided in the decree. That was the genesis of the present controversy.

Mrs. McIntosh, who was a resident of Connecticut, filed suit in 1929 against Mrs. Wiggins in the United States District Court in St. Louis to try the title to this one-twelfth share of the real estate. The petition alleged that the real estate had been part of the trust under the Liggett will (Tr. 217); that after the termination of the trust an undivided one-third interest passed to each of the three daughters for life with remainders over to the heirs of the body of each, but that in the event of the death of any of the daughters without issue, her portion of the estate should go to the survivors in equal portions for life with the remainder over to the heirs of their body respectively (Tr. 219).

The petition alleged the death of Cora Fowler without issue, survived by the two sisters, Mrs. Kilpatrick and Mrs. Wiggins (Tr. 219); the death of Mrs. Kilpatrick leaving as heirs of her body the plaintiff and Elizabeth Kennard (Tr. 219-220); and that upon the death of Dolly Kilpatrick the plaintiff, as one of the two heirs of her body, became the owner in fee simple of an undivided

one-fourth interest in the real estate (the one-fourth interest consisting of one-half of the original Kilpatrick third and one-fourth of the Fowler third, which the said quarter of the third represented an undivided one-twelfth interest in each of the parcels of real estate) (Tr. 220), and prayed the Court determine the title of the plaintiff and the defendant in the undivided one-twelfth interest (Tr. 221). Mrs. Wiggins' answer is found on pages 222-235 of the Transcript. She pleaded the terms of the will as construed by the decree of the Circuit Court in the will construction suit and pleaded the disputed paragraph of that decree (Tr. 225) which provided that upon the death of Mrs. Fowler without issue, an undivided one-half interest in the Fowler third should vest in each of the sisters for her life and on the death of either, the undivided one-half of the one so dying should vest in the survivor for her life and that upon her death the whole should go to and vest in the then surviving issue of Ella Wiggins and Dolly Kilpatrick, per stirpes (Tr. 225).

Plaintiff in her reply alleged that in the Circuit Court the only question that was tried was the question of whether the three daughters took fee or life estates (Tr. 239); that the Circuit Court was without jurisdiction to adjudge the future rights of prospective contingent remainders and that the disputed paragraph was void; that the Court had no power or jurisdiction to adjudicate the rights of Mrs. Perry as remainderman before those rights came into existence, and at the time the original decree was entered, there was no controversy between the remainders; that there was no issue made in the petition as to the rights of contingent remainders and the Court was, therefore, without power and jurisdiction to render judgment thereon (Tr. 241).

That the question as to whom the property would go on the death of Cora Fowler was not tried or submitted to the Court nor passed on, but it appears only because it

was inserted in the decree by the counsel who drafted it and it did not represent the findings of the Court (Tr. 242) and that thereby the decree was not res adjudicata (Tr. 242).

The case in the said Court was tried before Judge Faris who rendered judgment for the defendant. He also handed down an oral opinion which appears on pages 88-97 of the Transcript.

Judge Faris said "It is clear that the bill of complaint in the state court warranted that part of the decree of which the plaintiff complains. The answers of no one of the defendants at all changed the cause of action, nor did these answers ask for any relief inconsistent with or varying from that prayed in the original bill. In such case plaintiff was concluded by the judgment which was finally rendered, even though she saw fit to stand mute" (Tr. 95).

Judge Faris further commented on the statute limiting the relief in a default case to that not greater than demanded in the petition served on the defendant and stated that it is clear that the court was asked to decree the extent, nature, conditions and limitations of the life estates vested in the three daughters (Tr. 95-6) and that under the petition and within the purview of the issues necessarily raised, the state court had the right to determine and decree when and upon what contingencies the life estate fell in and was vested as an estate in fee in the remaindermen; "that is, whether such life estate continued to be such only until the death of all the original takers, or whether it fell in and vested in fee in the children of the body of any one of the original takers who might die and leave surviving her issue of her body. This the state courts did and this was a necessary finding in order that instructions shall be given to the trustees as to the manner of their conveyances and as to the estate they should convey; the more so, since the decree in the

state court case operated to transfer title in lieu of formal deeds otherwise necessary" (Tr. 96). The defense of res adjudicata was sustained.

On February 20, 1931, Judge Faris entered his findings and judgment for the defendant. They appear on pages 98-106 of the Transcript.

After making the findings concerning the pleadings and decree in the original will construction suit, the Court specifically held and adjudged that as between the parties thereto, the decree of the Circuit Court construing the will was res adjudicata and Mrs. Perry was and is bound thereby. From that judgment Mrs. Perry appealed to the United States Circuit Court of Appeals where it was affirmed on October 17, 1931. The opinion of the Court is reported in 57 F. (2d) 622. The affirmance was on the technical ground that no request for declarations of law having been made, there was nothing for review except the record proper. However, the Court stated that this holding resulted in no prejudice to Mrs. Perry as they had carefully examined the entire record and were of the view that on the merits the judgment should be affirmed (57 F. [2d], l. c. 625).

Mrs. McIntosh sought to obtain a writ of certiorari in this Court but her petition was denied on November 7, 1932 (287 U. S. 609) (Tr. 357).

In the meanwhile and while this appeal was pending, Mr. Bakewell, acting in behalf of his two clients, filed separate suits for each of them against Mrs. Wiggins. The one on behalf of Mrs. McIntosh was filed in the United States District Court at St. Louis on March 21, 1931 (Tr. 294), and the other on behalf of Mrs. Kennard in the Circuit Court of the City of St. Louis on March 21, 1931 (Tr. 294). Each of these suits was a bill in equity the general object and purpose of which was to have declared void the disputed paragraph of the original will construction decree on the ground that it was beyond the

jurisdiction of the Court and was obtained by fraud, accident or mistake. These suits were not brought to trial immediately; by agreement of counsel, they were to await the final outcome of the appeal taken in the first Federal suit. However, in March, 1933, Mrs. Kennard and Mrs. McIntosh filed in the original will construction suit a motion for a nunc pro tunc order to eliminate the disputed paragraph of the decree and substitute a different one on the ground that it was not the decree the Court entered. This motion appears at pages 256-266 of the Transcript.

To this motion Mrs. Wiggins filed a return which appears at pages 265-298 of the Transcript. This motion was denied by Judge Green (Tr. 309). Thereupon, these two movants unsuccessfully sought from the Supreme Court a writ of mandamus to compel Judge Green to grant the nunc pro tunc order (Tr. 309). They then appealed from the denial of their motion for the nunc pro tunc entry (Tr. 255) and the order was affirmed by the Court (119 S. W. [2d] 839) upon the ground that there must be support for a correction in the judgment sought by the movants from the pleadings, the records, or the minutes and that there is nothing in the records or minutes to support the nunc pro tunc correction sought (119 S. W. [2d], l. c. 842-3). The Court in the opinion further held that the Court had on the original appeal affirmed the judgment rendered in the form aforesaid and there can be no doubt about what judgment is referred to in the mandate; namely, the one rendered on June 23, 1923, containing the disputed paragraph.

The affirmance of the nunc pro tunc suit in the Court was on November 12, 1936, but due to a great number of motions filed by Mrs. McIntosh and Mrs. Kennard, the case was not finally disposed of until September 29, 1938, when the mandate went down.

In the meanwhile by agreement of counsel, trial of both the Kennard case and the second McIntosh case was de-

ferred until after the conclusion of the nunc pro tunc proceeding.

After her failure in the nunc pro tunc proceeding, Mrs. McIntosh filed an amended complaint in her second suit in the Federal Court. This appears on pages 315-329, inclusive, of the Transcript. By this petition she charged in substance that in view of the allegations and the prayer of the petition in the original will construction suit, which she claimed prayed for vested interests only and did not pray for an adjudication of contingent interests, the decree was beyond the issues and void as against Mrs. McIntosh and beyond the power and jurisdiction of the Circuit Court to adjudge an interest against her before she had acquired it (Tr. 322-3); that by reason of the expiration of the trust under the will in 1916 the trust had become dry and passive and that there was no necessity for directions to the former trustees by reason of the fact that the title had automatically vested in the beneficiaries and that the Court did not have jurisdiction on the theory of giving directions to the trustees (Tr. 323); that the insertion by counsel in the decree of a declaration concerning the prospective devolution of contingent interests was a fraud on the Court and upon Mrs. McIntosh and that counsel failed and omitted to advise the Supreme Court that the decree purported to so declare and that was a fraud upon the Supreme Court and upon Mrs. McIntosh (Tr. 323); that due to such failure, omission, mistake or fraud the Supreme Court failed to notice the provision and failed to delete it from the decree (Tr. 324); that it was the duty of all counsel to advise the Court that the decree contradicted the intention of the will in that respect.

That she did not acquire any actual interest in the estate until 1928 on the death of her mother, Mrs. Kilpatrick; that if the disputed provision of the decree be applied against her, it will deprive her of her property

without due process of law in violation of the rights guaranteed to her by the Fourteenth Amendment of the United States Constitution (Tr. 326).

It was further alleged that the provisions of the decree constitute a cloud upon the plaintiff's rights to the undivided one-twelfth interest contrary to the intention of the testator as stated by the Supreme Court in 1925 (Tr. 326-7).

The prayer of the petition was that the decree be declared void **as against the plaintiff** and that the defendant, Ella Wiggins, be enjoined from asserting any right or interest to the property by virtue of the disputed provision of the decree and that she be enjoined from collecting the income from the property by virtue of said decree (Tr. 327).

The petition also prayed that the Court determine the title to the one-twelfth interest in the real estate beween the plaintiff and the defendant.

The answer of Mrs. Wiggins to this petition is found on pages 330-364 of the Transcript. She pleaded that plaintiff was party defendant in the original will construction suit and was bound by the provisions of the decree rendered construing the will (Tr. 350); that the decree of the state court construing the will is res adjudicata of the plaintiff's claim.

As a further defense, Mrs. Wiggins alleged that the first Federal suit filed by Mrs. McIntosh and decided by Judge Faris adjudged the same question of title as is involved in the second suit (Tr. 352); that the same contentions were made and tried and decided against the plaintiff on the ground that the prior decree of the Circuit Court was res adjudicata and binding (Tr. 353); and that Judge Faris' judgment itself was res adjudicata in respect to the plaintiff's claim for relief (Tr. 354).

On November 27, 1939, Judge Davis handed down findings of fact, conclusions of law and judgment for the de-

fendant Mrs. Wiggins (Tr. 380). These findings and conclusions and the judgment are very complete; the findings of fact extend from page 380 to 458 of the Transcript; the conclusions of law from 458 to 471; and the directions for judgment and the judgment from pages 471 to 473.

Judge Davis held that the primary purpose of the suit was to obtain a decree wherein the disputed paragraph would be held void and of no effect (Tr. 381). In his findings he adverted to the original will construction decree and the failure of the trustees to convey the real estate to the three daughters because of their claim to the fee and that they had consulted counsel and that they needed the aid of a court of equity as to the duties of their trust; that the three daughters had brought the suit to have the will construed and to obtain instructions of the Court to the trustees concerning the conveyances the will directed the trustees to make (Tr. 387); that Mrs. McIntosh was personally served as were the trustees and all the lineal descendants, including the minor children (Tr. 388); that both the trustees and the trust property were located within the jurisdiction of the Circuit Court at that time.

Judge Davis also made findings as to the allegations contained in the original petition in that suit and the prayer (Tr. 390-2). That Mrs. McIntosh through the service upon her of the writ and petition had actual knowledge of the institution of the suit and the contents of the petition (Tr. 393); that the suit was actively defended; that the trustees answered and alleged that they needed the instructions of the Court as to the nature of the estate to be conveyed by them in making final distribution (Tr. 393); that Elizabeth Scudder and other minor children filed an answer by Mr. Reber contending that the three daughters had only life estates and in case of the death of one without issue with remainder to the survivor or survivors the remainder over upon the death

of the last survivor (Tr. 394). That the will construction suit was actively defended by John Liggett, Jr., by his counsel, McDonald and Just, and by John R. Denvir, guardian ad litem for the minor children of John E. Liggett, Jr. (Tr. 395); that in the will construction suit no copy of any pleading was served on Mrs. McIntosh except the plaintiff's petition; she filed no pleading but made default and did not take any part in the trial of the cause in the Circuit Court or the appeal in the Supreme Court (Tr. 395).

Judge Davis further found that in the trial of the case, Mr. Reber took the leading part in the defense and drew the first draft of the decree and submitted it to plaintiff's counsel; as a result of discussion among the counsel, it was submitted to all the counsel for their approval and was then presented to Judge Miller who filed it (Tr. 397); and that counsel for the plaintiffs in said cause while approving the form as appropriate under the decision did not consent to the entry of the decree (Tr. 397-8).

He further found that on appeal no error was assigned by the daughters relating to that part of the decree which is in dispute (Tr. 405); that Mrs. McIntosh took no part in the appellate proceedings, made no effort to make to the Supreme Court any contention that she made in this second Federal suit (Tr. 410). That the decree was affirmed by the Supreme Court and the mandate went down in April, 1925, affirming the decree in all things (Tr. 411), and from June 22, 1923, the entry of the decree, Mrs. McIntosh made no attempt to question or alter it until the death of Mrs. Kilpatrick on August 10, 1928, and then on June 19, 1929, she filed her first Federal suit against Mrs. Wiggins (Tr. 410).

Judge Davis further found that Judge Faris' opinion did not decide the question of the construction of the will but he decided that the averments of the petition in the will construction suit warranted the disputed part of the decree

and that the state court had the right to determine and to decree when and upon what contingencies the life estate fell in (Tr. 418). He found that this was a necessary finding in order that the instructions be given the trustees as to the manner of their conveyances and that Mrs. Perry was bound by the will construction decree as res adjudicata.

He further found that Judge Faris' judgment held that as between the parties to that suit the decree of the Circuit Court of Missouri is res adjudicata and that the title, rights and interest of the plaintiff are as the same were adjudged to be in the decree construing the will, namely, that Mrs. Wiggins has and since the death of Mrs. Kilpatrick has had an estate for life in the undivided one-twelfth interest (Tr. 420).

Judge Davis further found that a petition for writ of certiorari was filed by Mrs. McIntosh in the Supreme Court of the United States to review that case in which it was contended that the disputed paragraph was void for want of jurisdiction and it went beyond their power (Tr. 423). It was also alleged in that petition that no Court had ever decided what the rights of Mrs. McIntosh are under the will (Tr. 423-4).

Judge Davis further found that the Judge Faris judgment was entered February 20, 1931, and on March 31, 1931, the second Federal suit was filed and a companion suit was filed by Mrs. Kennard in the state Circuit Court. The subject matter of the original petition in the second Federal suit was an interest in the personal property and the subject matter of the amended complaint therein is an interest in both real and personal property and the Kennard suit involved an interest in both real and personal property. Mrs. McIntosh's first Federal suit involved only real estate (Tr. 439-40). That the primary purpose of both the additional suits is to avoid on the ground of alleged fraud on the state court the same provision of the decree that had been the subject matter of all the litigation

between said plaintiffs and Mrs. Wiggins (Tr. 440). In the amended complaint in the second Federal suit the subject matter in respect to the title is identical with that involved in the first Federal suit, in the nunc pro tunc case and in the mandamus case; namely, the one-twelfth of the net income from the death of Dolly Kilpatrick for the rest of Mrs. Wiggins' life (Tr. 440).

That these two Kilpatrick heirs began late in 1928 or early in 1929 to contend that their prospective contingent remainders in the Kilpatrick half of the Fowler third became vested in them at Mrs. Kilpatrick's death; that this contention was in direct conflict with the provision in the will construction decree.

Judge Davis also himself found, independently of the findings of Judge Faris, that the petition in the original will construction suit did not pray for adjudication of vested interests only but did include a request for instructions to the trustees concerning the nature of the conveyances they should execute pursuant to the will and to advise and direct the trustees and the plaintiff concerning future rights of the plaintiff to the trust estate and future duties of the trustees thereto (Tr. 444).

Furthermore, that the Circuit Court was fully informed of Mr. Reber's contention about the meaning of the will and insertion by Mr. Reber in the draft of the decree drawn by him of the disputed paragraph in harmony with his contention, did not deceive Judge Miller (Tr. 444-45).

In the appeal counsel fully informed the Supreme Court of all the provisions of the will and of the decree and also informed the Court in appellants' brief that Mr. Reber had contended in effect in the Circuit Court that under the will, the remainder of the Fowler portion will not vest until the death of the last survivor of the daughters (Tr. 446). Counsel also informed the Court in the copy of the decree that that decree while all the daughters

were living described the claim of persons without naming them, "who would take the contingent remainder upon the death of the last surviving daughter" (Tr. 446); that the chief question dwelt with in the brief of counsel and the opinion of the Circuit Court is whether the daughters received fee titles or life estates; that the Court and all counsel were informed that the disputed provision of the decree expressed the view of Mr. Reber, adopted by the Circuit Court (Tr. 446).

Further, that the Supreme Court knew of the disputed part of the decree and of Mr. Reber's contention, but, nevertheless, was not induced thereby to affirm the decree or delete therefrom the disputed paragraph (Tr. 447); that none of the facts on which were based the charges of fraud and mistake were proven and the charges are not true (Tr. 448); that the instant (second) suit was between the same persons as the will construction suit; the trust property was the same, and the same questions concerning the meaning of the will were involved. Mrs. McIntosh was party to the will construction suit and might have presented to the Circuit and Supreme Courts the same contentions that she makes now, but knowingly failed to do so and failed to present any reason why she stood mute (Tr. 449).

The conclusions of law by Judge Davis are found on pages 458-471 of the Transcript. It was concluded as a matter of law that the petition in the original will construction suit did not pray for an adjudication of vested estates only (Tr. 458); that the word "vested" as used in the petition did not mean a technical vesting but meant the nature, extent, conditions and limitations of title interest that had passed under the will to the daughters and the nature, extent, conditions and limitations of the interest that would pass upon the falling in of the life estates to the prospective contingent remaindermen and the averments and prayer of the petition were broad enough to include

both the interest that passed to the daughters and to the prospective contingent remaindermen upon the falling in of the life estates (Tr. 459).

The Court also concluded as a matter of law that there was no fraud, accident or mistake in the preparation of the decree or in its affirmance by the Supreme Court in the original will construction suit. See pages 459-462 of the Transcript.

It was also concluded as a matter of law that the decree in the original will construction suit is conclusive as res adjudicata between Mrs. McIntosh and Mrs. Wiggins in respect of the intention of the testator and the meaning of his will (Tr. 464).

Judge Davis then concluded as a matter of law to the effect that the suit was res adjudicata (Tr. 464).

Judge Davis also concluded as a matter of law that the plaintiff was bound by the judgment in the first Federal suit that Mrs. Wiggins has an estate for life in the disputed share (Tr. 466).

Judge Davis further concluded as a matter of law that the judgment of the Supreme Court in the nunc pro tunc suit is res adjudicata.

He further concluded as a matter of law that at the time of the will construction decree Mrs. McIntosh, as a prospective contingent remainderman, had the opportunity to make the assertions she now makes in respect to the construction of the will and, not having availed herself of the opportunity, is bound by the decree (Tr. 468), and that the Supreme Court affirmed the entire will construction decree and that that included the disputed paragraph (Tr. 471).

Thereupon, Judge Davis entered judgment on November 27, 1939, finding against plaintiff and in favor of defendant on all counts, and dismissed the bill with prejudice at plaintiff's cost (Tr. 472-3).

On February 5, 1940, a decree was rendered by the state

Circuit Court in the Kennard case in which the Court reached substantially opposite conclusions on the question of fraud, accident and mistake as applied to Mrs. Kennard and also on the question of jurisdiction. It based its decree on the ground that since Mrs. Kennard was a minor at the time and since the disputed paragraph of the decree resulted from the answer and the efforts of her counsel, Mr. Reber went beyond his authority as guardian ad litem and the decree was not binding on her for that reason. This decree appears on pages 111 and following of the Transcript.

The decree held that the disputed paragraph was void and without force or effect as against Mrs. Kennard and in favor of Mrs. Wiggins; and the Court enjoined the latter from asserting any right, title or interest in that property by virtue of the disputed paragraph of the decree and from collecting any rent or income by virtue thereof (Tr. 122).

The decree expressly stated that it was the intention and purpose of the decree to determine **as between Mrs. Kennard and Mrs. Wiggins** their respective claims to the undivided one-twelfth which passed on the death of Mrs. Kilpatrick (Tr. 124).

Mrs. McIntosh appealed from Judge Davis' judgment to the United States Circuit Court of Appeals (Tr. 481).

On July 25, 1941, and before the argument of the McIntosh case in the United States Circuit Court of Appeals, the Supreme Court of Missouri handed down the first opinion in the Kennard case, and on September 8, 1941, the McIntosh case was argued in the United States Circuit Court of Appeals and plaintiff was given leave to file certified copies of the opinion in the Kennard case (Tr. 482). This was done by her on September 18, 1941 (Tr. 490).

On October 29, 1941, the Circuit Court of Appeals affirmed the McIntosh case by a 2-1 decision. Plaintiff

filed a petition for rehearing on November 12, 1941, which was denied on November 29, 1941 (Tr. 493-4).

Plaintiff filed a petition for writ of certiorari in this Court, and it was stipulated that counsel for either party should have the right to inform this Court of any further orders in the Kennard case.

On December 16, 1941, the Supreme Court of Missouri filed its second opinion in the Kennard case, and on December 23, 1941, plaintiff filed a copy of that opinion in the United States Circuit Court of Appeals and moved to set aside and vacate its judgment of affirmance because of that subsequent modified opinion (Tr. 495-6). In said motion the following statements and arguments were made:

That the opinion of the United States Circuit Court of Appeals, rendered October 29, 1941, says it was to be noted that this Court did not hold in the Kennard case that the decree was procured by fraud, accident or mistake, and that the second opinion of this Court did say that the disputed paragraph amounted to a constructive fraud (Tr. 554); that the case presented purely matters of local law (Tr. 557); that where a state decree has been the sole basis for a Federal judgment, a supervening state decision is final and controlling and necessarily requires a Federal court to disregard its own previous judgments as to matters of local law (Tr. 559).

On the same day plaintiff filed a motion to further stay the mandate so that the Court of Appeals might retain jurisdiction to consider the effect of the specific ruling of the Court in the Kennard case (Tr. 497).

On January 26, 1942, these motions were denied (Tr. 496).

On February 26, 1942, the Supreme Court of Missouri rendered its third and final opinion in the Kennard case (Tr. 521). On March 2 this Court denied Mrs. McIntosh's petition for certiorari and a petition for rehearing thereof was denied March 20, 1942 (Tr. 499). 315 U. S. 815, 831.

On April 1, 1942, Mrs. McIntosh filed in the United States Circuit Court of Appeals a motion to remand the case with directions to retain the bill pending proceedings to be brought in the Courts of Missouri to obtain a definite determination as to questions of constitutional law under the State Constitution and other questions of state law (Tr. 511).

On May 11, 1942, this motion was denied and on May 25, 1942, the mandate was issued.

The motion to remand filed April 1 is contained in pages 539-551 of the Transcript, and the brief in support of that motion is found in pages 522-39 of the Transcript. It was stated in the motion that the Constitution of Missouri guarantees a certain remedy for every injury; the original will construction decree was wrong and the Supreme Court of Missouri had so ruled, and that decree injured Mrs. McIntosh by giving Mrs. Wiggins the very interests vested in Mrs. McIntosh, and that the action of the Circuit Court of Appeals itself denied her this right guaranteed by the State Constitution, and it is the duty of the Supreme Court of the state to interpret its organic law and the duty of the Federal Court to follow that interpretation (Tr. 540-41). That this was a question on which no Missouri Court has ever ruled and the refusal of relief violated Section 10, Article II, of the State Constitution (Tr. 541).

The prayer was that the motion be sustained and that the Court direct the District Court to retain the case pending such proceedings to be brought by Mrs. McIntosh in the state courts in order for those Courts to determine among other things:

(1) whether or not she has been deprived of a remedy for an injury in violation of Section 10 of Article II of the Constitution of Missouri;

(2) whether she has been deprived of her property without due process of law.

Mrs. McIntosh filed a full and careful brief in the United States Circuit Court of Appeals in support of the foregoing Motion to Remand in which she called attention that this Court had decided in the Kennard opinion that when Mrs. Kilpatrick died her half of the Fowler third vested in Mrs. McIntosh and Mrs. Kennard, one-twelfth each (Tr. 524), and that this established that Mrs. McIntosh owned the one-twelfth interest which she has been deprived of, and that the Supreme Court of Missouri has established that she has sustained an injury.

She further argued that the Federal Court sustained the jurisdiction of the original decree against a collateral attack and rested its judgment upon the disputed paragraph and directed that upon the death of Mrs. Wiggins, the entire Fowler third would vest in contingent remainder (Tr. 527-28); that the Federal judgment was in conflict with the Missouri Supreme Court's last decision; it was based solely on the decree in the original will construction suit and vests the title in another than whom the Supreme Court's decree vested it (Tr. 529).

She also sought to avoid the effect of the original will construction suit and of the original Federal suit as res adjudicata. She sought to dispose of the judgment at law in the original Federal suit. She argued also that the matter should be sent back to be held pending a new suit to be brought by her in the state court to determine the law of Missouri as applied to her (Tr. 537-38).

The United States Circuit Court of Appeals denied the motion to remand and the mandate went down affirming the decree of the District Court as stated above. Thereafter in January, 1943, plaintiff filed the instant suit in the Circuit Court of the City of St. Louis seeking a declaratory judgment that the Circuit Court did not have jurisdiction in the original will construction case and that

the decree was erroneous and that the Federal judgment in the first Federal suit was not binding on her because it was bottomed solely on that judgment of the Circuit Court; that the Circuit and State Supreme Court had held the disputed paragraph of the decree void for fraud and lack of jurisdiction; that this was a new fact and circumstance which deprived the Federal judgment of its binding effect.

She also asserted in the petition in the instant case that since the petition in the original will construction suit prayed only for the determination of vested interests, she had no notice of the decree which adjudged future or contingent interests and, therefore, she had no opportunity to be heard with respect to her interests which were then contingent, and to render that decree binding on her in this case would deprive her of her property without due process of law in violation of the Constitution of Missouri. She did not plead a violation of the Constitution of the United States (Tr. 18).

The decree of the trial court is very long but it sustained the plaintiff in every contention; declared title to the property to be in the plaintiff; declared that she was not bound by either of the two Federal judgments; vacated the disputed paragraph of the decree (Tr. 894 and 895) and enjoined the defendants from claiming the property under the provisions of the Federal judgments (Tr. 896 and 897) and rendered a money judgment for the amount of the disputed income with interest totalling $386,247.94.

On appeal the Supreme Court of Missouri reversed this judgment in toto (Tr. 922). This opinion is not officially reported but is published at 191 S. W. (2d) 637 (Adv. Op., February 12, 1946).

The state Supreme Court after reciting the facts concerning this litigation (Tr. 922-27) and reciting in full the

contentions of the parties (Tr. 926-30), made the following rulings in substance:

1. That since Mrs. McIntosh was not a party to the Kennard case, the undivided twelfth interest claimed by her was not involved in that litigation, and Mrs. Wiggins was not bound as to the McIntosh interest because the estoppel by judgment must be mutual or will not be binding (Tr. 930).

2. That the Kennard case did not determine that the original decree was void as to Mrs. McIntosh (Tr. 931).

3. If it be assumed that the decree of the trial court in the Kennard case was based on fraud, accident and mistake (independent of the action of the guardian ad litem) and based upon want of jurisdiction, they were not litigated and decided in that proceeding as between Mrs. Wiggins and Mrs. McIntosh (Tr. 931).

4. That under the terms of the original will construction decree, Mrs. Wiggins has a life interest in the disputed twelfth interest claimed by Mrs. McIntosh and it is unaffected by the Kennard decree (Tr. 931).

5. Since the ownership of the one-twelfth interest claimed by Mrs. McIntosh was not an issue in the Kennard case and since Mrs. McIntosh was not a party thereto, the Kennard decree did not and could not have determined that Mrs. McIntosh's rights vested in 1928 as against Mrs. Wiggins.

6. That the original will construction decree continued in force and effect as to Mrs. McIntosh and that her interest vested on Mrs. Wiggins' death in 1942 (Tr. 932).

7. The issue of the jurisdiction of the Circuit Court in the will construction case and the issue of fraud, accident

and mistake in the procurement of the original decree, have been fully litigated between the parties and the judgments which determined those issues remain in full force and effect.

8. The Kennard decree was not a new fact as between Mrs. McIntosh and Mrs. Wiggins to change the legal relationship existing between them so as to relieve Mrs. McIntosh of the binding effect of the judgments.

9. There was sufficient difference between the two equity cases against Mrs. Wiggins, one brought by Mrs. Kennard and the other by Mrs. McIntosh, in the grounds for the relief in the two cases; namely, the infancy of Mrs. Kennard and the defense of res adjudicata against Mrs. McIntosh to sufficiently explain the difference in the results obtained (Tr. 932-33).

10. That Mrs. McIntosh is not entitled to any relief because, being sui juris, she has had her day in court.

11. The fact that the original decree was erroneous although affirmed by an opinion since overruled, does not keep it from being valid and binding on the parties (Tr. 933).

SUMMARY OF THE ARGUMENT.

I.

The petition should be denied for failure to properly state the matter involved in the petition.

Supreme Court Rule 38.

II.

The decision of the state Supreme Court below rested on the binding effect of the original will construction decree of the state Circuit Court and certiorari should be denied on this ground regardless of any Federal question.

Lynch v. New York ex rel. Pearson, 293 U. S. 52;
Radio Station WOW, Inc., v. Johnson (not officially reported), 89 L. Ed. Adv. Op. 1397).

III.

The contention of the Petitioner that the Missouri Supreme Court gave improper effect to the judgments of the Federal Court is frivolous.

Dupasseur v. Rochereau, 21 Wallace 130;
Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Company, 228 U. S. 596.

IV.

The assertion of Petitioner that she has been deprived of her property without due process of law in violation of the Fourteenth Amendment of the U. S. Constitution is also frivolous.

Davidson v. City of New Orleans, 96 U. S. 97;
Louisville & Nashville Railroad Company v. Schmidt, 177 U. S. 230;
American Railway Express Co. v. Kentucky, 273 U. S. 269.

V.

The Federal questions she raises are not timely.

Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413.

VI.

The questions of the jurisdiction of the state Circuit Court in the original will construction case and of the due process laws of the Federal Constitution have already been ruled by the Federal Courts and certiorari denied by this Court.

Perry v. Wiggins, 287 U. S. 609;
McIntosh v. Wiggins, 315 U. S. 815, 831.

ARGUMENT.

I.

The petition should be denied for failure to properly state the matter involved in the petition.

The Petitioner in the statement of the matters involved as well as the argument repeatedly makes the statement that the will construction decree of the state Circuit Court was not only erroneous but void (Pet. 3), and that that decree was subsequently declared void by the Supreme Court of Missouri for lack of jurisdiction of its subject matter and for fraud (Pet. 4).

It is stated that the Supreme Court of Missouri in this case denied the Petitioner her claim solely because of the Federal judgments holding that the void decree of the state Circuit Court was res adjudicata (Pet. 4). Again it is stated that the state Circuit Court adjudged that on the death of Mrs. Kilpatrick the title to the disputed share vested in Mrs. McIntosh and Mrs. Kennard, and the Supreme Court of Missouri affirmed each of these rulings in the case of Kennard v. Wiggins (Pet. 6). Again on page 7 it is stated that the state Supreme Court itself had adjudged the paragraph in the decree to be void because of fraud and lack of jurisdiction and that by its own judgment the Supreme Court of the state had established that the state Circuit Court could not have adjudged these titles in 1923 but that nevertheless Mrs. McIntosh was bound by the Federal judgment (Pet. 7-8). Further that the State Supreme Court ruled that because of the Federal judgments the original decree which was void was nevertheless binding and conclusive on Mrs. McIntosh (Pet. 8). Again on page 9 it is stated that the Supreme Court of Missouri has adjudged that Mrs. McIntosh could not have been heard in respect to her title under the will in the original case because the Circuit Court in that case lacked

jurisdiction to adjudge her interests which were then future and contingent but in that she is nevertheless bound because of the Federal judgments.

She predicates her whole case upon these statements that the original decree was void and have been so held by the state courts, both Circuit and Supreme, including the opinion below in this case, and that the only reason that she is held to be bound is by the Federal judgments.

Upon this she builds her whole argument to the effect that she never had a hearing as to her rights under the will in any case and that judgments of the Federal Court can never be res adjudicata as to questions of title under a will which are matters of local law, in the face of the state court's ruling that the title was the other way.

We are not at this point arguing the soundness of those contentions even if the assumptions of fact upon which they are based were true in this case which they are not. We are pointing them out here for the purpose of showing that the case is not properly presented here for certiorari at all for failure to state the true situation.

The original decree was held void by the state Circuit Court in Mrs. Kennard's case but in that case only as between Mrs. Kennard and Mrs. Wiggins (Tr. 122). The Supreme Court affirmed that decree (160 S. W. [2d] 706).

Reference was made by the state Supreme Court in the Kennard opinion, in which the will was interpreted to mean that Mrs. Kilpatrick's share vested in the heirs of her body upon her death, one-twelfth in Mrs. Kennard and one-twelfth in Mrs. Wiggins. However, that court, in the instant case, stated that there is no conflict between the original will construction decree and the Kennard decree so far as concerns Mrs. McIntosh and that since the one-twelfth interest claimed by Mrs. McIntosh was not an issue in the Kennard case and she was not a party thereto, the Kennard decree did not and could not have determined that Mrs. McIntosh's rights vested on the death of

Mrs. Kilpatrick (Tr. 932). Furthermore, the opinion in the instant case says that there was no determination that the original decree was void as to Mrs. McIntosh (Tr. 931).

As to the statements that the original decree has been held void by the state Circuit and Supreme Courts, both for fraud and lack of jurisdiction; the Circuit Court in the Kennard case did hold that the original decree was void for want of jurisdiction and fraud as between Mrs. Kennard and Mrs. Wiggins. The Supreme Court on appeal wrote three different opinions; they based their affirmance primarily on the question of the binding effect of the decree upon Mrs. Kennard by reason of her infancy. It is certainly doubtful whether they held that this was a fraud on Mrs. Kennard. They did make a general statement in the opinion that the proof supported the allegations of the petition but limited that statement to the holding that she was not bound because she was a minor.

Moreover, the United States Circuit Court of Appeals for the Eighth Circuit in the second Federal suit brought by Mrs. McIntosh, pending when the state Supreme Court handed down the Kennard v. Wiggins opinion, specifically ruled that the Kennard case not only did not help Mrs. McIntosh but that the Supreme Court of Missouri did not hold that the original McIntosh decree was procured by fraud, accident or mistake or that it was void and not binding on adult defendants who were served with process but did not appear. 123 F. 2d 316, l. c. 322.

Moreover, as we have pointed out above, the state Supreme Court below in its opinion in the instant case expressly held that there was no determination that the original decree was void as to Mrs. McIntosh (Tr. 931). On the other hand, it continued in force and effect as to her (Tr. 932).

The Petitioner in this case states and repeatedly argues that she never had an opportunity to be heard as to her rights under the will. However, the state Supreme Court

in its opinion in the instant case held that she did have her day in court; that the judgment was not erroneous but valid and binding on the parties (Tr. 933). As a matter of fact, Mrs. McIntosh herself brought both Federal suits. In each case she took an appeal to the United States Circuit Court of Appeals and applied for certiorari to this Court. Then she brought the instant suit, had a hearing in the state Circuit Court and on appeal in the state Supreme Court. In those cases she had an opportunity to contest and did contest the jurisdiction of the Circuit Court in the original will construction decree and her claim of fraud in the procurement of that decree.

None of these important facts are stated by the Petitioner in her petition.

A mere statement of these facts which she failed to present in her petition shows their importance and that the case is, in fact, entirely different from the one she presents in her petition and, therefore, no grounds for granting the writ of certiorari are stated, which this Court should consider.

II.

The decision of the state Supreme Court below rested on the binding effect of the original will construction decree of the state Circuit Court and certiorari should be denied on this ground regardless of any Federal question.

> Lynch v. New York ex rel. Pearson, 293 U. S. 52;
> Radio Station WOW, Inc., v. Johnson (not officially reported), 89 L. Ed., Adv. Op. 1397.

The Missouri Supreme Court in its opinion below placed its decision on two grounds; first, that the original will construction decree was not void as to respondent but continued in force and effect as to her and that her interest under the decree vested in her at Mrs. Wiggins' death in 1942 (Tr. 931-32); second, that the question of

jurisdiction and fraud had been fully litigated and determined adversely to Mrs. McIntosh in the Federal cases which were unaffected by the Kennard decree, to which Mrs. McIntosh was not a party (Tr. 932).

Under the first of these two rulings, Mrs. Wiggins had her life interest to the disputed twelfth by virtue of the original will construction decree which was valid and in full force and effect. This is a full, complete answer to Mrs. McIntosh's claim. It bases Mrs. Wiggins' right squarely under the original state court decree. This is a mere determination of matters of local law. There is no Federal ground in that at all and it accounts within itself for the judgment of the Missouri Supreme Court. That gives Mrs. Wiggins and thus the defendants (respondents here) title to this disputed property, independent of the Federal judgments. That should be the end of this application. It makes no difference how many Federal grounds the state court summons in aid of its judgment, whether right or wrong. It founded its judgment upon an adequate ground of state and local law and no upsetting by this Court of the state court's opinions as to the effect of the Federal judgments would alter that result.

III.

The contention of the Petitioner that the Missouri Supreme Court gave improper effect to the judgments of the Federal court is frivolous.

Petitioner states that the effect of a judgment of a Federal court given by a state court is a Federal question. Assuming this is true, the rule is in those cases where the Federal jurisdiction is founded upon diversity of citizenship, the state court is required to give the Federal judgment the same effect as it would a similar judgment of a state court. A mere inspection of the opinion of the state

Supreme Court in this case shows that it did. So far as the opinion deals with the effect of the judgments of the Federal courts, the effect given them is that based upon the common law rule of res adjudicata applicable in the state of Missouri to any state court. The Court below in the opinion merely held the judgments had the common law effect of res adjudicata as to both jurisdiction and fraud in the rendition of the original will construction decree and that upon common law grounds as announced by the decisions of the Missouri courts the effect of those judgments was not altered by the Kennard case to which Mrs. McIntosh was not a party (Tr. 931 and 932). As a matter of fact, the opinion cites nothing but Missouri cases and the Restatement of the Law of Judgments; not even a Federal case is cited as authority. The only reference to a Federal case is the two prior Federal cases brought by Mrs. McIntosh and they are only stated as part of the facts in this case, not even as authority establishing the rule of res adjudicata. All the state Supreme Court held on this question was that any judgment which has become final which determines any issue between the parties thereto, including questions of jurisdiction and fraud in relation to a prior judgment between the same parties is binding under the common law of Missouri; that is nothing more nor less than giving these Federal judgments the identical effect they would have had had the suits been brought by Mrs. McIntosh in the state courts instead of the Federal courts.

Indeed the very effect of the opinion is that the Federal judgments have just such an effect because it rules the case simply on the basis of the binding effect of any judgment including those of state courts. That in itself gives them the same effect as judgments of state courts, which is what the state court is supposed to do. Dupasseur v. Rochereau, 21 Wallace 130.

Indeed the Petitioner in this case is driven to take the

position that a Federal judgment upon a question of state law, even though it has become final cannot be res adjudicata in the courts of that state if it is opposed to a subsequent decision of the highest court of the state.

That simply is not the law.

We are not dealing with judgments of Federal courts which have not yet become final, but which can still on appeal be reversed. We are not dealing with the question as to the effect of a Federal judgment or an opinion of a Federal court on matters of state law as a rule of decision in subsequent cases as against subsequent contrary rulings as to matters of state law by the state courts. The Petitioner is confusing two entirely different questions, the question of the binding effect of the Federal judgment upon the parties after that judgment has become final with the question of a ruling of Federal courts as establishing the law of the state for other cases. That is entirely different. All the cases cited by the Petitioner involve situations either in which the Federal judgment had not yet become final or in which the court merely ruled that in subsequent cases not involving the same cause of action, the Federal courts will follow supervening decisions of the state courts in other cases as establishing the applicable law. In this case, both Federal judgments had become final. Indeed, in the second Federal case in the Circuit Court of Appeals, Mrs. McIntosh asked that court to remand the case to the District Court to enable her to bring a suit in the state court to have the state courts determine these matters and with the direction to the District Court to stay the proceedings in the Federal case until she could do that, and that was denied and the judgment became final. Nevertheless, she brought this case in the state court anyhow, trying to upset those two Federal judgments.

Nor are we dealing with the power of the Federal courts to upset their final judgments which had been procured by fraud. These Federal judgments were not procured by

fraud; she doesn't claim that. She brought the suits herself; she claimed in the second Federal case that the original will construction decree was procured by fraud as against her and the court specifically found that it had not been and there was no fraud in its procurement, and that judgment became final.

Where the jurisdiction of a court of the United States is properly invoked by a non-resident and it is asked to determine title to property within the state as in these two Federal cases, it has power and jurisdiction to determine these matters, although they are matters of local law. Indeed, it is under the obligation to decide every question presented to it for decision in the determination of such a suit, and it has just as much power to render a judgment binding on the parties to the suit involving questions of state law as it has to render judgment involving questions of Federal law.

That final judgments of the United States Courts in cases properly before them are res adjudicata, not only as to questions of federal law, but as to all matters of state law, is well settled. Railroad Commission v. Pacific Gas, 302, U. S. 388, 82 L. Ed. 319; Hopkins v. Southern Calif. Telephone Co., 275 U. S. 393, 72 L. Ed. 329.

The latest case on this subject is the case of In re President and Fellows of Harvard College, 149 Fed. (2d) 69. In that case Harvard College had instituted in the United States Court a suit against the City of Providence to construe a will of a Rhode Island citizen and determine that certain provisions of the will which created a forfeiture of the trust fund and vested it in Harvard College had become operative. Thereafter, the City filed a suit involving the same questions in the local court at Providence, and the United States Court on motion of the City stayed proceedings in the federal case until the determination by the Supreme Court of Rhode Island of the questions involving the construction of that will.

Whereupon, Harvard College instituted a mandamus proceeding against the United States District Judge to compel him to proceed with the case brought in his Court by Harvard, and the mandamus was granted. The Circuit Court of Appeals in its opinion quoted from a number of recent cases from this court to the effect that in the absence of some recognized public policy which would in exceptional cases warrant it (not present in a suit to construe a will), it has from the first been deemed to be the duty of the federal court after jurisdiction is properly invoked to determine and decide questions of state law whenever necessary to the rendition of a judgment; that Erie R. Co. v. Tompkins did not free the federal courts from the duty of deciding cases of state law in diversity cases, and that the federal district court should have proceeded and exercised the jurisdiction invoked. The Circuit Court of Appeals then proceeded with this significant statement:

> "If the federal district court had proceeded to hear and determine the issues presented in the case pending before it, its judgment, so far as concerns the issues common to the two cases, would be res judicata" (149 Fed. [2d], l. c. 73).

And again on the same page:

> "Hence there would be no prospect that the judgment of the federal district court might go for naught because of a later decision of the state court interpreting the will differently" (149 Fed. [2d], l. c. 73).

Mrs. McIntosh is in the unhappy position of having invoked the jurisdiction of the United States District Court twice and asked it pass on her title to the property, questions of local law, and now that she has lost both of those cases she is asking the state courts to render judgment contrary to those contentions upon the ground that the federal courts did not have power to bind her by judgments rendered pursuant to the jurisdiction she invoked.

But the Petitioner's position in this case is even worse than that. She goes farther than merely to say Federal judgments cannot be binding on matters of state law, because she says also that the Supreme Court of Missouri cannot even say that they are. The effect of the opinion of the Supreme Court of Missouri in this case is a ruling that the judgments in this case which are Federal judgments have the same effect on matters of state law involving fraud or lack of jurisdiction as do judgments of its own courts. The Petitioner here now says that it couldn't do so under the Federal Constitution and statutes.

That contention is frivolous and confers no jurisdiction on this Court. Consolidated Turnpike Co. v. Norfolk & Ocean View Railway Company, 228 U. S. 596.

IV.

The assertion of Petitioner that she has been deprived of her property without due process of law in violation of the Fourteenth Amendment of the U. S. Constitution is also frivolous.

Mrs. McIntosh was personally summoned to appear in the original will construction case. She made no appearance and no attempt to be heard, nor did she appeal to the Supreme Court of Missouri.

Six years later after events proved whether her mother, Mrs. Kilpatrick, or Mrs. Wiggins would die first, she then in 1929 brought suit claiming title under the will in the United States District Court in St. Louis by virtue of her residence in Connecticut. Upon the defense being made by Mrs. Wiggins that she was bound by the decree of the will construction suit, she replied that that court was without jurisdiction and she had had no opportunity to be heard in that case (Tr. 241, 242). The District Court, presided over by Judge Faris, ruled against her (Tr. 105, 106). She appealed to the United States Circuit Court

of Appeals for the Eighth Circuit which affirmed the judgment (57 F. [2d] 622). She sought certiorari here which was denied (297 U. S. 609, 77 L. Ed. 529).

In the meanwhile, she brought a second suit in the United States District Court seeking to set aside the original will construction decree on the ground of fraud and want of jurisdiction, and that Court by Judge Davis ruled against her (Tr. 472, 473), specifically finding that there was no fraud (Tr. 461, 462) and that the Circuit Court did have jurisdiction of the original will construction case (Tr. 462). In her petition in that second Federal case, she asserted that to hold that original will construction suit binding on her would deprive her of her property in violation of the due process clause of the Fourteenth Amendment to the United States Constitution (Tr. 326). While Judge Davis did not specifically rule on that contention, he necessarily did so because he dismissed her petition on the merits (Tr. 473). He also ruled that Judge Faris' judgment was res adjudicata as to the jurisdiction (Tr. 464).

She appealed from Judge Davis' decree to the Circuit Court of Appeals which affirmed the decree of Judge Davis (123 F. [2d] 316). She again sought certiorari from this Court but it was denied (315 U. S. 815, 86 L. Ed. 1212, rehearing denied 315 U. S. 831, 86 L. Ed. 1224).

She brought a third suit, this time in the state Circuit Court. In that petition she again charged the want of jurisdiction in the original will construction decree (Tr. 21). She again asserted that to hold it binding on her would violate her rights under the due process clause; only this time she specified only that that clause in the Missouri State Constitution and carefully avoided charging any violation under the Federal Constitution (Tr. 26). She won in that court but on appeal the Supreme Court of Missouri reversed the decree and held that she had had

her day in court in the original will construction decree; that that decree was wholly erroneous but was in full force and effect and binding on her (Tr. 932-3).

It is obvious from a statement of these facts that the contention that she never had a hearing and the due process clause had been denied her is frivolous.

It is well settled that when an opportunity to make a claim is given in the ordinary courts of justice appropriate to the nature of the case, the judgment in such proceeding cannot be said to deprive the owner of his property without due process of law. Davidson v. City of New Orleans, 96 U. S. 97; Louisville & Nashville Railroad Company v. Schmidt, 177 U. S. 230.

The mere fact that the state court made an erroneous decision in the regular course of judicial proceeding does not deprive the unsuccessful party of property without due process of law. American Railway Express Co. v. Kentucky, 273 U. S. 269.

The whole trouble with the Petitioner's case boils down to this: She failed to defend the suit to construe the will which was the time she should have defended and set up her present contentions as to her rights under the will; she herself, by virtue of her non-residence, elected to bring two suits in the Federal court which she lost. Then she brought this suit, a third one in the state Circuit Court avoiding raising any Federal questions herself in this case, thinking because Mrs. Kennard had been successful, she might be more successful in the state courts than she had been in the Federal courts, but in that she was disappointed. The Supreme Court of Missouri decided the case against her. Now she is trying to get back into the Federal courts, namely, this one, in the hope that she can get some relief here on Federal grounds which she carefully avoided raising in the state courts below and which are wholly frivolous.

V.

The Federal questions she raises are not timely.

As we have shown, she did not raise any Federal question involving the jurisdiction of the Circuit Court in the original petition in the first Federal suit when she should have raised it. She did raise it in the second Federal suit but it was adjudged against her. She carefully avoided raising it in the instant case in the Circuit Court of the City of St. Louis or on appeal in the Supreme Court of Missouri. Not until that Court had held that the original will construction decree was valid and binding on her and in full force and effect did she then for the first time on rehearing raise the question of due process under the Federal Constitution. That comes too late. As was said by this Court in Chicago, I. & L. R. Co. v. McGuire, 196 U. S. 128, 49 L. Ed. 413, l. c. 417:

> "The true and rational rule stated by this Court * * * is clearly applicable: 'That the Court must be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress **was relied on by the party who brings the writ of error and that the right thus claimed by him was denied.**' This case is the not infrequent one of an attempt to clutch at the jurisdiction of this Court as an afterthought when all other resources of litigation have been exhausted." (Emphasis ours.)

VI.

The question of the jurisdiction of the state Circuit Court in the original will construction case and the due process clause of the Federal Constitution have already been ruled by the Federal Courts and certiorari denied by this Court.

This Court has twice denied certiorari to this Petitioner in the two prior Federal cases. In the first one the juris-

diction of the Circuit Court in the will construction decree was involved. In the second suit, that question was again involved as was the question of fraud in the procurement of that [redacted] and also the effect of the first Federal decree as res adjudicata.

All these three were adjudged in the second Federal case which was affirmed on appeal and in which this Court denied this Petitioner certiorari; so this Court has already ruled twice on these matters to the extent of denying petitions for certiorari in those cases. The writ should be denied in this case too.

Respectfully submitted,

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